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IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 1035

JOSEPH BERTMAN, doing business as
BERTMAN FOOD PRODUCTS,

Petitioner,

against

J. A. KIRSCH CO.; and the
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT J. A. KIRSCH CO. IN OPPOSITION

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Question Presented

Whether a Court of Appeals, after the time to appeal has expired, should grant leave to a defendant and third-party plaintiff to appeal from so much of a judgment as was in favor of the third-party defendant, where the defendant's only excuse for failure to file a timely notice of appeal is that he did not learn that the plaintiff had taken an appeal until after the defendant's time to appeal had expired.

Additional Rule Involved

"Rule 6—Time * * *

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Jan. 21, 1963, eff. July 1, 1963."

Statement

The judgment of the District Court (App. 9) was entered on October 28, 1963. The time to appeal from the judgment expired December 27, 1963.

The petitioner did not bring on his motion in the District Court for leave to file a late notice of appeal until January 16, 1964. The District Court denied his motion on the same day, without prejudice to him renewing his motion following disposition of a motion to be made by him in the Court of Appeals for leave to appeal (App. 12). Nevertheless, on January 17, 1964 he filed a late notice of appeal which was dated January 16, 1964 (App. 12, 16-17).

Petitioner then brought on a motion on January 27, 1964 in the Court of Appeals for leave to appeal, or in the

alternative for an order declaring him to be an appellant as against the third-party defendant "within the ambit of the notice of appeal by the plaintiff". The Court of Appeals denied this motion on January 31, 1964.

The issues litigated at the trial between the plaintiff United States of America and the defendant Joseph Bertman were essentially different from those litigated between Joseph Bertman as third-party plaintiff against J. A. Kirsch Co. as third-party defendant. The Government had claimed as against Bertman that it had a written contract with him for the purchase of tomato paste and that among its terms was a requirement that there should be no deterioration in the quality of the tomato paste for a period of six months after delivery to the Government; also a provision that the tomato paste must comply with the Federal Food, Drug and Cosmetic Act.

Bertman had purchased the tomato paste in question from the third-party defendant J. A. Kirsch Co. As between Bertman and Kirsch, Kirsch claimed (and Bertman agreed) that their contract of sale contained no provisions with regard to quality and that all of Kirsch's obligations with respect to quality would be satisfied if the Food and Drug Administration at New York issued certificates passing the merchandise and permitting its entry into this country from abroad. This the Food and Drug Administration did. Specific questions were submitted to the trial jury by the Court concerning the contract between Kirsch and Bertman as follows, all of which the jury answered in the affirmative:

> "5. Was it the understanding between Bertman and Kirsch that Kirsch's obligations as regards the quality of the tomato paste would be satisfied if the Food and Drug Administration at New York issued its certificates passing the merchandise and permitting its entry into this country?

6. Were the obligations of Kirsch to Bertman pursuant to their agreement complied with by Kirsch when the Food and Drug Administration at New York issued its certificates passing the merchandise and permitting its entry into this country?

7. Did Bertman rely entirely upon the issuance by the Food and Drug Administration at New York of its release certificates in paying Kirsch for the tomato paste which Bertman purchased from Kirsch?" (App. 13-14)

Argument

Rule 73(a) of the Federal Rules of Civil Procedure permits an extension of the time to file a notice of appeal upon a showing of excusable neglect "based on a failure of a party to learn of the entry of the judgment".

Rule 6(b) specifically states that the Court may not extend the time for taking action under Rule 73(a) except to the extent and under the conditions stated in Rule 73(a).

The petitioner does not claim that he was unaware of the entry of the judgment (Pet. 8), or that he supposed for any reason that his time to appeal had been extended.

Rule 73(b) states that the "notice of appeal shall specify the parties taking the appeal". The notice of appeal filed by the plaintiff United States of America herein specifies the party taking the appeal is the plaintiff United States of America.

The foregoing Rules, as well as Section 2107 of Title 28 U.S.C. (Pet. 3-4), have often been held to be mandatory and jurisdictional.

The petitioner cites three recent decisions by this court: *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U. S. 215; *Thompson* v. *Immigration and Naturalization*

Service, 375 U. S. 384; *Wolfsdon* v. *Hankin* (No. 680), ——— U. S. ———, 84 S. Ct. 699, 11 L. Ed. 2d 636. All three cases resemble each other in the respect that the appellants therein had relied upon extensions of time granted, and findings and statements made by the District Courts, and had therefore not filed their notices of appeal within the time limited by the Rules, although they could easily have done so, and probably would have done so, if they had not been misled by the actions taken by the District Courts.

No such situation is presented here. The petitioner did not rely upon any action taken by the District Court. He simply allowed his time to expire, apparently, so far as appears from his attorney's affidavit in the Court of Appeals (A4 10), without making any effort to ascertain from the plaintiff whether it intended to appeal, and without checking with the office of the Clerk of the Court on the sixtieth day to determine whether any notice of appeal had been filed by the plaintiff.

In *Whitehead* v. *American Security & Trust Co.*, 285 F. 2d 282 (U.S.C.A., D. of C., 1960), the plaintiff filed her appeal from a judgment in favor of the defendant on the last day. The defendant and third-party plaintiff was two days late in filing its appeal from so much of the judgment as dismissed its complaint against the third-party defendant. The Court of Appeals noted that the defendant evidently had not intended to appeal unless the plaintiff appealed from the judgment in favor of the defendant. The defendant urged substantially the same argument in opposing a motion to dismiss its appeal as does petitioner here. However, its appeal was dismissed for lack of jurisdiction, the Court pointing out, among other things, that Rule 73(b) provides that the notice of appeal "shall specify the parties taking the appeal; * * *", and that the notice which was filed by the plaintiff specified that the

appeal was taken by the plaintiff (as does the plaintiff's notice of appeal here), and not by the defendant.

It is evident that the judgment in favor of Kirsch against Bertman was bottomed upon the jury's answers to the specific questions submitted to them (pp. 3-4, *supra*) and not upon the jury's finding that there was no liability in the first instance by Bertman to the Government. The defendant and third-party plaintiff Joseph Bertman should have anticipated that the Government might appeal from the judgment against it, and nothing prevented him from filing a notice of appeal within sixty days of the judgment from that portion of the judgment which was favorable to Kirsch in order to protect himself against that eventuality. Having failed to do so, he has waived his right to do so.

Language from the concurring opinion in *Tallman v. Tidall*, 324 F. 2d 411, 418 (U.S.C.A., D. of C., 1963), in another context, is appropriate here:

> "It may seem anomalous at first blush that a successful litigant in the lower court should be under any necessity whatsoever of appealing from the decree which brought him victory. But the judgment may, as here, be comprised of several elements, adverse as well as favorable. If the prevailing party wishes to rely on appeal on a contention decided against him, he must preserve his rights by an appeal. This can be by a cross-appeal if time permits after his opponent has appealed, or it may be by a timely notice of appeal which can be dismissed if the other party elects not to pursue the litigation further. In the absence of such a preservation of the point, the successful litigant must be taken to have regarded the grounds upon which he won as so strong that he is content to rely upon them alone in the appellate proceedings."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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